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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-376

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

The petitioners, Susquehanna Valley Teachers' Association, New York Congress of Teachers, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James C. Trask, pray that a writ of certiorari be issued to review the opinion and judgment of the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, rendered in these proceedings, the decision having been rendered on January 3, 1974, and the order thereon having been entered on January 22, 1974.

Opinions Below.

The respondent endeavored to commence this proceeding in Special Term, Supreme Court, Broome County, State of New York. The petitioners appealed from all parts of the order of Special Term, except that portion denying respondent's motion for a preliminary injunction against the New York Congress of Teachers, granting a preliminary injunction in favor of the respondent against the petitioners, and denying petitioners' motion to vacate the *ex parte* order to show cause with restraining order, to the Appellate Division, Third Judicial Department, which unanimously affirmed the order of Special Term. Petitioners thereafter moved in both the Appellate Division and the New York Court of Appeals for permission to appeal to the Court of Appeals from the order and decision of the Appellate Division. Both motions were denied.

The order of the Court of Appeals dismissing petitioners' motion for leave to appeal to the Court of Appeals, as yet unreported, appears at Appendix A, *infra*. The decision of the Court of Appeals, also unreported, dismissing petitioners' motion for leave to appeal to the Court of Appeals appears at Appendix B, *infra*. The order of the Appellate Division, Third Department, denying petitioners' motion for leave to appeal to the Court of Appeals, appears at Appendix C, *infra*. The memorandum decision of the Appellate Division, Third Department, denying petitioners' motion for permission to appeal to the Court of Appeals is printed at Appendix D, *infra*. The Supreme Court, Broome County, did not issue a written decision and/or opinion, but the bench decision of Justice Brink appears in the record at page 15 and at pages 98 and 99, and is printed at Appendix E, *infra*. The order of the Supreme Court, Broome County, based upon the aforesaid bench decision appears

at Appendix F, *infra*. The Appellate Division, Third Department, unanimously affirmed the order of Supreme Court, Broome County, in a decision reported in 43 A. D. 2d 198, 350 N. Y. S. 2d 805 (1974), a copy of which along with the order of affirmance appears at Appendix G, *infra*. The order of the Court of Appeals of the State of New York dismissing petitioners' motion for leave to appeal to that court was entered on July 11, 1974 (see Appendix A, *infra*). This petition for certiorari was filed less than 90 days from the date of the entry of the aforesaid order of the New York State Court of Appeals.

Jurisdiction.

The order of the Appellate Division, Third Judicial Department, was entered on January 22, 1974, and the order of the New York State Court of Appeals dismissing petitioners' motion for leave to appeal to that court was entered on July 11, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1257(3).

Questions Presented.

1. Whether the *ex parte* temporary restraining order dated October 11, 1972, issued by Supreme Court, Broome County (Brink, J), was constitutionally void since it purported to restrain those subject to it from exercising their First Amendment rights, and was issued without notice to those affected by it?

2. Whether the preliminary injunction issued herein by the Supreme Court, Broome County (Brink, J.), was and is too broad, and thereby violated and violates the

constitutional rights of free speech and of due process of the petitioners and other persons who might be subject to the order?

Constitutional and Statutory Provisions Involved.

This case involves Section 6313 of the Civil Practice Law and Rules of the State of New York, Section 210(1) of the Civil Service Law of the State of New York and the First and Fourteenth Amendments to the United States Constitution. These and all other relevant statutes are reprinted in Appendix H, *infra*.

Statement of the Case.

A. Background.

Whether or when the underlying action herein was commenced was at issue in the courts below. An *ex parte* order to show cause requesting a preliminary injunction and containing a temporary restraining order signed by the Hon. Robert O. Brink, Justice, Supreme Court, County of Broome, on October 11, 1972, made returnable before him on October 18, 1972, together with supporting papers and a summons and complaint demanding that the defendants named therein be temporarily enjoined, restrained and prohibited from certain acts enumerated therein, were allegedly served by personal service upon Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James Trask. Service upon the New York Congress of Teachers was not affected, although personal service of the aforementioned papers was made upon one, Belen Bradley, a paid employee of that organization.

A temporary restraining order contained in the *ex parte* order to show cause aforementioned, which order is printed in its entirety in Appendix I, *infra,* provided in part as follows:

> "ORDERED that pending the hearing and determination of this motion, the individual Defendants herein, the Defendant Association, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff School Districts Schools; *from ~~picketing and by~~ marching on the school grounds of said School District during normal class hours, 7:45 A. M. to 3:35 P. M. on Monday through Friday;* from intimidating, coercing or in any way interferring with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; *from contacting in person or by phone those persons employed by District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion; and it is further* * * *" (record, p. 205). (Italics supplied.)

Thereafter an order to show cause to vacate respondent's *ex parte* order and temporary restraining order and to dismiss the complaint therein, was signed by Justice Brink on October 13, 1972 (record, p. 222), made returnable before him October 18, 1972, and was served with supporting papers on behalf of petitioners upon the attorneys for respondent on October 14, 1972.

In the aforesaid order to show cause petitioners moved to vacate respondent's temporary restraining order claim-

ing that the same was null and void *ab initio* upon the grounds, among others:

> "* * * that said order is overly broad and in violation of the constitutional rights of the defendants as guaranteed by the 1st and 14th Amendments to the Constitution of the United States * * *" (record, p. 222).

In his affidavit in support of petitioners' order to show cause to vacate the *ex parte* order and temporary restraining order, counsel for petitioners alleged at paragraph "10" thereof:

> "That the aforesaid order of Mr. Justice Brink purports to limit the rights of defendants to speak freely; to peacefully assemble and to petition for the redress of grievances. These rights are protected against governmental interferences by the 1st and 14th Amendments to the Constitution and by the Constitution of the State of New York" (record, p. 225).

The aforesaid order to show cause to vacate the *ex parte* order together with the affidavit of Bernard F. Ashe, Esq., in support thereof are printed at pages 53-57 of Appendix J, *infra.*

On October 18, 1972, Justice Brink heard oral arguments on petitioners' motions (record, pp. 2, 15 and 96-98), and counsel for petitioners argued that, irrespective of the authority and power of the court to issue the temporary restraining order, it had no right or power to enjoin conduct protected by the 1st and 14th Amendments to the United States Constitution in the absence of a clear demonstration that the conduct enjoined was unpeaceful and that the regular police authorities were unable to cope with such a situation, in the following manner:

"Section 211 of the Civil Service Law establishes, in my opinion, a special jurisdiction in the Supreme Court for the purpose of issuing an injunction in this kind of a situation, and I think it is significant that it is a special purpose statute, but nevertheless, Section 211 provides for injunctive relief only. I do not think that section necessarily gives the Court the expressed authority to enjoin other conduct.

"The Court: Wouldn't it be a matter of common sense that it was incidental to the strike?

"Mr. Ashe: I am not sure that is constitutionally permitted if the conduct itself is not unlawful. I think as a general proposition, the concept of picketing and other modes of marching, gathering in peaceful assembly, and what have you is conduct which is constitutionally protected by the First and Fourteenth Amendments. I think that kind of conduct can only be restrained where it has been clearly demonstrated—and I don't think there is any clear demonstration—where it has been clearly demonstrated; one, that it is unpeaceful; two, that the regular police authorities are unable to cope with the situation and, therefore, the extraordinary power of the Court is necessary to attempt to remedy that situation to abort what may be irreparable harm" (record, pp. 5-6).

At the close of oral arguments on the aforesaid motion to vacate, Justice Brink denied the same from the bench stating:

"The Court: The Court has considered the points that you have raised. The decision of the Court is the motion to vacate the stay and the show cause order and the injunction contained therein is denied. And the Court will now proceed to consider the application for a preliminary injunction, and you say you are prepared to offer testimony at this time?" (record, p. 15.)

Thereafter Justice Brink heard testimony offered by respondent in support of its request for a preliminary injunction and at the close of said testimony decided to grant respondent's request for a preliminary injunction against the Susquehanna Teachers' Association, all of its officers, and all of the members thereof individually, and to deny said request with respect to the New York State Congress of Teachers on the ground that the proof did not establish justification for a temporary injunction against that organization (record, pp. 98-99). The aforesaid decision of the court from the bench is printed in Appendix E, *infra*. The court did not otherwise issue a written decision.

On October 19, 1972, pursuant to the aforesaid decisions, Justice Brink signed an order denying petitioners' motion to vacate and dismiss and granting respondent's request for a preliminary injunction except with respect to the New York Congress of Teachers (record, pp. 201-203), which order is printed in Appendix F, *infra*, and which reads in part as follows:

> "ORDERED, that defendants' motion to vacate the *Ex Parte* Order to Show Cause with Restraining Order is denied; and it is further,
>
> "ORDERED, that Plaintiff's motion for a Preliminary Injunction against the Defendant New York Congress of Teachers is hereby denied; and it is further
>
> "ORDERED, that pending the final determination of this action, the Court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers, including but not limited to Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, all of the individual members of the Susquehanna Valley Teachers' Association, re-

straining them and the said teachers association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; *from marching, and from picketing on the school grounds of the Plaintiff School District on Monday through Friday from 7:45 A. M. to 3:35 P. M.;* from intimidating, coercing or in any way interferring with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said Plaintiff School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school." (Italics supplied.)

The aforesaid order was entered in the office of the Broome County Clerk on October 19, 1972.

B. Proceedings in the Supreme Court, Appellate Division, Third Department.

Thereafter petitioners took an appeal to the Supreme Court, Appellate Division, Third Department, from all parts of said order except that portion denying respondent's motion for a preliminary injunction against the New York Congress of Teachers (record, p. 200).

In his brief-in-chief before the Appellate Division, Third Department, counsel for petitioners presented several questions for consideration by the court the sixth of which was:

> "Whether the restraining orders issued were too broad and thereby violated the constitutional rights of free speech of the defendants and other persons who might be subject to the order?" (Petioners' Appellate Division brief-in-chief, p. 3.)

Counsel for petitioners went on to argue in Point III of petitioners' brief-in-chief before the Appellate Division that the temporary restraining order of October 11, 1972, should not have been issued on the grounds, among others, that since it purported to restrain petitioners in the exercise of their protected First Amendment rights, namely "from marching," and "from contacting in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting plaintiff in carrying out lawful duties of maintaining school, pending the argument of this motion" (record, p. 205), and was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto, it amounted to a denial of petitioners' substantive and procedural rights to due process as guaranteed to them by the Fourteenth Amendment.

Counsel for petitioners in Point V of petitioners' brief-in-chief before the Appellate Division further contended that the order granting the preliminary injunction herein was overbroad and constitutionally void in that it amounted to a denial of petitioners' First Amendment rights without due process of law and a denial of petitioners' rights to the equal protection of law as guaranteed to them by the Fourteenth Amendment (petitioners' brief-in-chief, p. 75).

By decision dated January 3, 1974, the Appellate Division, Third Department, unanimously affirmed the order of Special Term. The decision of the Appellate

Division dealt with the constitutional issues raised on behalf of petitioners but found that they were without any substantial merit:

> "Defendants' contentions that the temporary restraining order should not have been issued without notice and that the preliminary injunction is unconstitutional are without any substantial merit" * * *" (43 A. D. 2d 200).

Subsequent to the receipt by the attorney for petitioners of a copy of the order of the Appellate Division on January 28, 1974, said order being dated and entered in the office of the clerk of that court on January 22, 1974, petitioners, by motion returnable before the Appellate Division, Third Department, March 4, 1974, applied to said court for an order granting leave to appeal to the Court of Appeals from the unanimous order of affirmance of the Appellate Division, Third Department, upon the grounds, among others, that this cause presented and involved important constitutional issues and principles relevant to and affecting the entire area of public employer-employee relations which ought to be determined and resolved by the highest court of the State of New York. The Appellate Division, Third Department, by order dated and entered in the office of the clerk of that court on May 21, 1974, denied petitioners' motion for permission to appeal to the Court of Appeals.

C. Proceedings in the New York State Court of Appeals.

Thereafter by motion returnable before the New York State Court of Appeals on June 10, 1974, petitioners moved in said court for an order allowing an appeal to be taken by the petitioners to that court from the order of the said Appellate Division, Third Department, upon the grounds, among others, that this cause raised and

raises and involves serious constitutional issues and principles important to and affecting the entire area of public employer-employee relations and specifically raising, among others, the following questions:

> "Was the *ex parte* order constitutionally void since it purported to restrain those subject to it from exercising their First Amendment rights, and was issued without notice to those affected by it * * *
>
> "Whether the restraining orders issued herein (record, pp. 204-205, 202-203) were too broad and thereby violated the constitutional rights of free speech of the defendants-appellants and other persons who might be subject to the order?" (Motion and brief before the New York Court of Appeals, pp. 19 and 21.)

In the brief submitted on behalf of petitioners to the Court of Appeals in support of their motion for leave to appeal to that body, counsel for petitioners contended in Point III therein that the temporary restraining order of October 11, 1972, since it purported to restrain petitioners in the exercise of their protected First Amendment rights and was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto although they were all available so to do, amounted to a denial of petitioners substantive and procedural rights to due process as guaranteed to them by the Fourteenth Amendment.

In Point V of petitioners' brief in support of their motion for leave to appeal to the Court of Appeals, counsel for petitioners contended that the order granting the preliminary injunction therein prohibiting them from marching and from picketing on the school grounds of the respondent school district was and is overbroad, and was and is therefore constitutionally void in that it amounts to a denial of petitioners First Amendment rights with-

out due process of law and a denial of petitioners rights to the equal protection of law guaranteed to them by the Fourteenth Amendment.

The Court of Appeals of the State of New York by decision and order dated July 11, 1974, dismissed petitioners' motion for leave to appeal to that body upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the New York Constitution.*

Thus, appellants have exhausted all of their available efforts to seek review in the courts of the State of New York.

Reasons for Granting the Writ.

I.

The *ex parte* Temporary Restraining Order of October 11, 1972, issued by Supreme Court, Broome County, State of New York, was and is constitutionally void in that it is overly broad and violates the constitutional rights of the petitioners as guaranteed by the First and Fourteenth Amendments to the United States Constitution and the Appellate Division's decision that petitioners' constitutional contentions were without any substantial merit is not in accord with applicable decisions of this Court.

Petitioners submit that the *ex parte* order of the Supreme Court, Broome County, State of New York, dated October 11, 1972, was overly broad and consequently constitutionally void insofar as it purported to restrain the petitioners in the exercise of, and therefore infringed upon, their protected First Amendment rights, namely

*To the best of petitioners' knowledge, no proceeding instituted pursuant to *Civil Service Law* §211 has been processed to the permanent injunction stage. Thus the issues raised herein would in all probability never be heard by the New York Court of Appeals.

"from marching" and "from contacting in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion * * *" (record, p. 205). And since it was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto, although they were all available so to do, it amounted to a denial of petitioners' substantive and procedural rights to due process guaranteed to them by the Fourteenth Amendment.

In *Carroll, et al., v. President and Commissioners of Princess Anne, et al.*, 393 U. S. 175 (1968), the Court said, in striking down a ten-day *ex parte* order initially issued by a Maryland County Court prohibiting a certain organization from holding within that time any public rallies or meetings:

> "The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence, for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.
>
> "* * * Prior restraint upon speech suppresses the precise freedom which the first Amendment sought to protect against abridgment.
>
> *"The court has emphasized that '[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constiutional validity.' Bantam Books v. Sullivan,* 372 U. S. 58, 70 (1963); *Freedman v. Maryland,*

380 U. S. 51, 57 (1965). *And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in Freedman v. Maryland, supra, at 58, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'* • • •

"The value of a judicial proceeding, as against self-help by the police is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. *The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.*

"The same is true of the fashioning of the order. *An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order.* In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker,* 364 U. S. 479, 488 (1960). In other words, *the order must be tailored as precisely as*

> *possible to the exact needs of the case. The participation of both sides is necessary for this purpose."* 393 U. S. 180-184. (Italics supplied.)

See also, *School Committee v. Westerly Teachers Assn.*, 299 A. 2d 441, 82 LRRM 2567 (Sup. Ct., Rhode Island, 1973) at page 2570, wherein the Rhode Island Supreme Court, in striking down an *ex parte* restraining order enjoining a teacher strike, said:

> "*Ex parte* relief in instances such as teachers-school committee disputes can make the judiciary an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining process. We embrace the position taken in *School District v. Holland Education Assn.*, 380 Mich. 314, 157 N. W. 2d 206, 67 LRRM 2916 (1968), where it was held that the trial court, before giving affirmative relief, should normally conduct a hearing where it would review what has gone on between the disputants and then determine whether injunction should issue and if so, on what terms and for what period of time."

Groppi v. Leslie, 404 U. S. 496 (1972), is also instructive along these lines. There the Court, in rejecting as violative of due process the action on the part of the Wisconsin Assembly in holding petitioner in contempt without giving him notice or an opportunity to answer, stated that:

> "Indeed we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence • • • In *Mullone v. Central Honor Trust Co.*, 339 U. S. 306 (1950), the Court stated:

> "'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. 339 U. S. at 313'" (at p. 502).

Picketing as a mode of free speech was approved in *Thornhill v. State of Alabama,* 310 U. S. 88, 7 LRRM 697 (1940), wherein at 7 LRRM 699, 703 and 704, the Court stated:

> "First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state • • •
>
> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment • • •
>
> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.,* 307 U. S. 496 (4 LRRM 501); *Schneider v. State,* 308 U. S. 147, 155, 162-63 (5 LRRM 659). See *Senn v. Tile Layers Union,* 301 U. S. 468, 478."

The Court further went on to specifically emphasize that restraint of this kind of activity must be seriously limited:

> "• • • Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelli-

gent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.'

* * *

"The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter * * *."

See also, *Dause, et al., v. Bates,* 359 F. Supp. 139 (W. D. Ky. 1973); *Amalgamated Fruit Employees Union, Local 590, et al., v. Logan Valley Plaza, Inc., et al.,* 391 U. S. 308 (1968); *Bell v. Burson,* 402 U. S. 525 (1971); *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Perry v. Sindermann,* 408 U. S. 593 (1972).

In *Boddie v. State of Connecticut,* 401 U. S. 371 (1970), in speaking of due process the Court stated:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is

> to the courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."

See also, *Cross Company v. United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155, AFL-CIO, et al.*, 123 N. W. 2d 215 (Mich. Sup. Ct. 1963), for a detailed discussion of the undesirable impact of the interjection of the court's injunctive power into a public employee collective bargaining dispute even in the face of an ongoing strike and a civil prohibition against such strikes.

It should be noted at this point that Rule 65(b) of the Federal Rules of Civil Procedure further underscores and reflects the paramount importance of notice with respect to due process rights, by the stringent limitations and conditions precedent which it places upon the issuance of a temporary restraining order in any case, let alone one involving a defendant's First Amendment rights:

"Rule 65. Injunctions

"(b) Temporary Restraining Order; Hearing Notice; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered on record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the ad-

> verse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

Section 210 of the *Civil Service Law* prohibits strikes by public employees, and a strike is defined in Section 201, subdivision 9, of said law as:

> "The term 'strike' means any strike or other concerted stoppage of work or slowdown by public employees."

However, nowhere in the *Civil Service Law* can a provision be found which would otherwise limit public employees in the exercise of their First Amendment rights.

Despite petitioners' contention as outlined above, the Appellate Division, Third Department, has taken the position that such contentions are without any substantial merit citing in support of its position the following cases, *City of New York v. DeLury,* 23 N. Y. 2d 175, 295 N. Y. S. 2d 901 (1968), app. dsmd. 394 U. S. 455 (1969), reh. den. 396 U. S. 872 (1969); *Rankin v. Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625 (1968); *Matter of State of New York v. Fuller,* 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dept. 1968). However, it is respectfully submitted that those cases are distinguishable from the one at bar, and therefore not applicable to it. The *DeLury* case it would seem, stands for the proposition that Section 210 of the *Civil Service Law* prohibiting strikes in order to achieve a state policy in an area open to state regulation, is not unconstitutional but did not, and does not, hold that Section 210 of the *Civil Service Law* limits in any way a citizen's First Amendment rights, in this case the right to free speech and free expression as evidenced by marching and/or contacting

or talking to others. The objection to the temporary restraining order in the case at bar is that it arbitrarily curtailed First Amendment rights of the petitioners and other persons affected by it, which rights were not restricted by Section 210 of the *Civil Service Law,* and therefore, because it was issued without notice, it further violated the rights of the petitioners to the due process of law guaranteed to them by the Fourteenth Amendment to the United States Constitution.

Rankin v. Shanker held that public employees and labor organizations representing them were not entitled to a trial by jury in a criminal contempt proceeding for violation of Section 210 of the *Civil Service Law,* and also the classification which differentiates between strikes by public employees and private employees is reasonable and does not offend the constitutional guarantees of equal protection, but did not treat the question as to whether or not a temporary restraining order which goes beyond Section 210 of the *Civil Service Law* and in fact abridges the First Amendment rights of the persons affected by it, may be granted without notice and without violating the due process provisions of the Fourteenth Amendment, and is therefore inapplicable to the case at bar.

The *ex parte* temporary restraining order issued in the *Fuller* case also cited by the Appellate Division was not overbroad as was the temporary restraining order issued herein in that the order in the *Fuller* case specifically prohibited those affected by it from striking and encouraging and condoning such a strike, but did not, as did the order here, purport to restrain *those affected by it from exercising their right to free speech by marching or contacting others.* See *Concerned Consumers League v. O'Neil, et al.,* 371 F. Supp. 644 (D.C., E.D. Wisc. 1974).

In view of the above it is respectfully submitted that the *ex parte* temporary restraining order of October 11, 1972, was constitutionally void in that it was overly broad and therefore infringed upon petitioners' protected First Amendment rights, and in that it was issued without affording petitioners the right to be heard, depriving petitioners of their substantive and procedural due process rights guaranteed by the Fourteenth Amendment. It is further submitted that the decision of the Appellate Division, Third Department, holding that petitioners' constitutional contentions, as outlined above, were without any substantial merit, was not in accord with applicable decisions of this court.

II.

The order of Supreme Court, Broome County, State of New York, dated October 19, 1972, granting a preliminary injunction is constitutionally void insofar as it fringes upon, interferes with and denies petitioners' First Amendment rights protected by the United States Constitution, and the decision of the Appellate Division, Third Department, that petitioners' contentions in this regard were without any substantial merit is not in accord with applicable decisions of this Court.

The *Civil Service Law* of the State of New York, Section 210, prohibits public employees from engaging in a strike. Nowhere in the *Civil Service Law* or any other law for that matter, relating to public employees, can any provision be found which would permit an interference with and a denial of First Amendment rights guaranteed to public employees as well as all other citizens under the Constitution of the United States.

To the extent then, that the order granting a preliminary injunction herein forbids petitioners and prohibits them "from marching and from picketing on the school grounds of the Plaintiff School District" (record, p. 203), it is overbroad, particularly in view of the fact that the superintendent of schools considered the teachers to be fired and no longer employed by the School District, and constitutionally void in that it amounts to a denial of petitioners' First Amendment rights without due process of law and a denial of petitioners' rights to the equal protection of laws as guaranteed to them by the Fourteenth Amendment.

Francis P. Donnelly, Superintendent of Schools within respondent's District, testified at the hearing on the motion for a preliminary injunction, that respondent's teachers went on strike on Friday, October 6, 1972 (record, p. 23), that the following Monday, October 9, 1972, was a legal holiday (record, p. 28), and that on the following Tuesday, October 10, 1972, schools in the district were open for orientation of new teachers, so that the schools could safely open on the following day (record, p. 29). Nelson Spaulding, Vice-Principal of respondent's School District testified at the hearing that the School District considered itself fully staffed on Wednesday, October 11, 1972 (record, p. 59), that Wednesday, October 11, 1972, was a full school day (record, p. 59), and that on Wednesday, October 11, 1972, there was adequate personnel to handle normal school business on that day in the District (record, p. 60).

Superintendent Donnelly went on to testify at the hearing that the students, as a result of the teacher absences, lost time from school amounting to two days, October 6th and October 10th, 1972 (record, p. 39). He went on to testify that on October 6th, 130 teachers absented themselves from their teaching duties (record,

p. 24), and that the District had hired a new teaching staff (record, p. 44). He continued on to say that the new teachers hired were considered by him to be permanent teachers, and that about one hundred and thirty of them were hired to replace the absent teachers (record, p. 49). When asked the following questions by counsel for the defendants, Mr. Donnelly gave the following answers (record, p. 50):

> "Q. Now, if I remember correctly, you said there was a total of 182; is that the total school personnel professional complement? A. Yes.
> "Q. And of that number, approximately 160 were classroom teachers? A. Yes.
>
> • • •
>
> "Q. Is it my understanding that you have hired 130 permanent replacements? A. Yes.
> "Q. Would it be correct then to say insofar as the school district is concerned, at this time, that it has the same staff in terms of numbers that it had as of October 5? A. We have more.
> "Q. You have more? A. Yes.
> "Q. With respect to the normal school functions, this personnel then is adequate to conduct those school functions? A. Yes."

On re-cross examination, Superintendent Donnelly was asked the following questions, and gave the following answers (record, pp. 80-83):

> "Q. I am not sure, Mr. Donnelly, that I understand what you are saying. Would you repeat for me what you meant by permanent replacements? A. Yes. We have replaced the striking teachers with permanent teachers, as I stated before, and these people will remain with us as long as they perform their duties well until some court or some law is given to us reinstating some other teachers.

"Q. Is it my understanding then, that at the moment that you replaced 130 teachers; that you considered those 130 teachers to be absent from work and no longer employed by the school district? A. Yes, sir.

"The Court: Have you discharged them?
"The Witness: Yes.
"The Court: Have you sent notices discharging them?
"The Witness: We have told them that they are discharged as teachers? They have tenure; don't they? Some of them did, didn't they?
"The Witness: They did * * *.

* * *

"Q. Have you ever, at any time, made the statement to the press or to the teacher's representatives, that they may consider themselves unemployed? A. Yes.

"Q. As of what time did you consider the teachers who have absented themselves as being unemployed? A. As soon as they were on strike.
"Q. That would be as of October 6th? A. As soon as they were on strike.
"Q. That would be as of October 6th? A. Yes, sir.
"Q. So, it is your testimony then, as far as the plaintiff District is concerned, that as of the time the teachers absented themselves on October 6th until the present time that you have not considered them to be employees of the district during that period? A. I personally did not consider them as being employees."

In view of the above it is therefore submitted that the record below far from containing any evidence tending to show that respondent had, or was about to suffer, immediate and irreparable injury and/or loss, or damages, on the contrary, from the testimony of Superintendent Donnelly and Vice-Principal Nelson Spaulding, it was

clear that the School District was able to operate normally, even despite the alleged absences of most of its regular teachers, whom it considered fired at the time of the hearing below.

There was absolutely no showing, as the transcript of the hearing below abundantly indicates, that there existed a countervailing state interest of such overriding significance which would permit the court to so interfere with petitioners' rights to free speech, and expression, and of the right to peacefully assemble. See *Boddie v. State of Connecticut, supra.* See also *Carroll, et al., v. President and Commissioners of Princess Ann, et al., supra; Thornhill v. State of Alabama, supra,* and *Amalgamated Food Employees Union, Local 590, et al., v. Logan Valley Plaza, Inc., et al., supra.* That this free speech right of teachers exists even in the face of unlawful strike activity is supported by *Dause, et al., v. Bates, supra,* wherein the court in rejecting the right of a school board to demote the plaintiffs because they supported a strike stated as follows at 369 F. Supp. 147:

> "In previous cases such as *Keyishian v. Board of Regents,* 385 U. S. 589 (1967); *Shelton v. Tucker,* 364 U. S. 479 (1960); and *Wieman v. Updegraff,* 344 U. S. 183 (1952), the Supreme Court has jealously protected the 1st Amendment rights of teachers to speak out on matter of public importance. This Court is of the firm opinion that the support by a teacher of a strike which has subsequently been declared civilly illegal is not such conduct as warrants the right of a school board to dismiss him or demote him. In this regard, see particularly *Keyishian v. Board of Regents, supra,* 385 U. S. at pages 605 and 606.
>
> "The Court's attention has been called to footnote 3 at page 570 of *Pickering v. Board of Education, supra,* but this lends no comfort to defendants since plaintiffs, in this case, were not concerned

with public criticism of their superiors but were advocating a strike in order to further their economic cause.

"*Keyishian*, when read closely, cites the fact that teachers are free to indulge their 1st Amendment rights, even to the point of advocating conduct which might prove to be civilly illegal, as long as such conduct is not in connection with subversion or violence, or is criminal in nature."

In short, it is submitted, that, even if the court felt compelled to issue a preliminary injunction because a strike by certain public employees allegedly existed, its order which went far beyond commanding those employees to return to work, and sought to restrict those individuals in the free exercise of their First Amendment rights, was unwarranted, unjustified by the proof, and constitutionally prohibited.

In holding petitioners' contention that the preliminary injunction was unconstitutional was without any substantial merit, the Appellate Division again cited the three cases previously referred to, namely, *City of New York v. DeLury, supra; Rankin v. Shanker, supra,* and *Matter of the State of New York v. Fuller, supra.* As indicated above, those three cases are distinguishable from the case at bar and inapplicable thereto. Neither of these cases hold, or even infer, that a court has the power to go beyond Section 210 of the *Civil Service Law* in forbidding public employees to strike; and further to forbid them to freely express their opinions and feelings with regard to a labor dispute, by marching or picketing when such activities unaccompanied by violence or a disturbance of the public peace constitute protected activity under the First Amendment to the United States Constitution. As was said in *Aurora Education Association v. Board of Education,* 490 F. 2d 431 (7th Cir., 1973):

> "Where a governmental body seeks by an overbroad regulation to preclude both lawful and unlawful speech, the regulation because of its overbreadth is a violation of guarantees of free speech and is unconstitutional." (Citations omitted.)

In view of the above it is again respectfully submitted that the order of Supreme Court, Broome County, State of New York, dated October 19, 1972, was overbroad, and as a consequence constitutionally void, and the decision of the Appellate Division, Third Department, holding that petitioners' constitutional contentions in that regard were without any substantial merit, is in error and not in accord with the applicable decisions of this Court.

Conclusion.

For the foregoing reasons, petitioners respectfully urge that this Court grant their petition for a writ of certiorari.

Dated: October 3, 1974.

Respectfully submitted,

BERNARD F. ASHE,
Counsel for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205
459-5400.

Of Counsel:

JAMES R. SANDNER,
ROCCO A. SOLIMANDO.

APPENDIX.

Appendix A—Order of Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of July, A. D. 1974.

Present:

Hon. Charles D. Breitel, Chief Judge, presiding.

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3 Mo. No. 551

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondents,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

GEARON KIMBALL
Deputy Clerk

Appendix B—Decision of the Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal.

3 Mo. No. 551

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondents,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Decision of Court of Appeals Jul 11 1974

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Appendix C—Order of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 4th day of March, 1974.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants-Appellants.

App. Div. 21795

A motion having been made by Defendants-Appellants at this term of court in the above-entitled proceeding for an order granting leave to appeal to the Court of Appeals: now, after reading and filing proof of due service of the notice of motion, the affidavit of Bernard F. Ashe, in support of the motion, and no one having appeared in opposition thereto, and the Court having rendered a decision on the 6th day of May, 1974, it is hereby

ORDERED that, said motion is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: May 21, 1974.
A True Copy:
JOHN J. O'BRIEN, Clerk

Appendix D—Memorandum Decision of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

May 6, 1974

21795

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Motion for permission to appeal to the Court of Appeals denied, without costs.

Herlihy, P. J., Cooke, Sweeney, Kane and Main, JJ., concur.

Appendix E—Bench Decision of Justice Brink, Supreme Court, Broome County, Printed From the Record, Pages 15, 98-99.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT No. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants.

Index No. 102266

Appearances:

Messrs. Shaw, Esworthy, O'Brien & Crowley (Maurice P. O'Brien, Esq., and Frank C. Shaw, Esq., of Counsel), Attorneys for Plaintiff, 123 Front Street, Binghamton, New York.

Bernard F. Ashe, Esq., Attorney for Defendants, 80 Wolf Road, Albany, New York.

Richard N. Aswad, Esq., Attorney for Defendants, 106 Front Street, Binghamton, New York.

The issues in the above entitled action came on for trial at an Adjourned Special Term of Supreme Court

held in the court house, Binghamton, New York, on Wednesday, October 18, 1972, before Hon. Robert O. Brink, Justice.

The Court: The Court has considered the points that you have raised. The decision of the Court is the motion to vacate the stay and the show cause order and the injunction contained therein is denied. (Record—Page 15.)

• • •

The Court: The Court grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers name [*sic*] in the show cause order, and all of the members of the organization individually, restraining them and the said Teachers' Association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said defendants from engaging in a strike from work by absenting themselves individualy or en masse from their assigned duties as classroom teachers in plaintiff school district schools, from marching and picketing on the school grounds of said school district on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said school district; from coercing in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting the school board in carrying on its lawful duties of maintaining school.

The Court denies the action of an injunction against the New York State Congress of Teachers on the ground that the proof does not establish justification for a temporary injunction against that organization. You may submit an order. (Record—Pages 98-99.)

Appendix F—Order of Supreme Court, Broome County, Dated October 19, 1972.

At an adjourned Special Term of the Supreme Court of the State of New York held in and for the County of Broome at the County Courthouse in the City of Binghamton, New York, on the 19th day of October, 1972.

Present:

Honorable Robert O. Brink, Justice.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants-Appellants.

The Plaintiff having duly moved this Court for an Order granting a preliminary injunction enjoining the Defendants above named, the Defendant Associations, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engag-

ing in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; from marching on the school grounds of said School District on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from said School buildings of said School District; from coercing in person or by phone those persons employed by the School District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining School; and

The Defendants having moved for an Order of this Court vacating Plaintiff's Order to Show Cause with Temporary Restraining Order as being null and void *ab initio;* and

Said motions having regularly come on to be heard on the 18th day of October, 1972.

Now, upon reading and filing the Order to Show Cause dated October 13, 1972, seeking to vacate the *ex parte* Order and Temporary Restraining Order, the affidavits of Bernard F. Ashe, sworn to the 13th and 18th days of October, 1972, the affidavit of Lynn H. Blanton, sworn to the 13th day of October, 1972 with accompanying exhibit in support of said motion, and upon reading and filing the Order to Show Cause with Restraining Order signed the 11th day of October, 1972 with due proof of service thereof; the accompanying affidavits of Francis P. Donnelly dated October 10, 1972, the Summons and Complaint verified the 10th day of October, 1972 with attached exhibits, and the Court having taken the testimony and received evidence in the matters before it, and having heard Frank C. Shaw, Jr. and Maurice P. O'Brien, attorneys for the Plaintiff and Bernard F. Ashe and Richard N. Aswad, attorneys for the Defendants, and due deliberation having

been had, it appears that a cause of action exists in favor of the Plaintiff against the Defendants to enjoin an illegal strike and conduct related thereto and that Plaintiff is entitled to a preliminary injunction against the Defendants; Susquehanna Valley Teachers' Association, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, and that the proof failed to justify a preliminary injunction against the Defendant, New York Congress of Teachers; now on motion of the attorneys for the plaintiff; it is

ORDERED, that defendants' motion to vacate the *Ex Parte* Order to Show Cause with Restraining Order is denied; and it is further,

ORDERED, that Plaintiff's motion for a Preliminary Injunction against the Defendant, New York Congress of Teachers is hereby denied; and it is further

ORDERED, that pending the final determination of this action, the Court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers, including but not limited to Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, all of the individual members of the Susquehanna Valley Teachers' Association, restraining them and the said teachers Association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; from marching, and from picketing on the school grounds of the Plaintiff School District on Monday through Friday from 7:45 A. M. to 3:35 P. M.; from intimidating coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and

from the school buildings of the said Plainitff School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school.

Signed this 19th day of October, 1972.

Enter:

/s/ ROBERT O. BRINK
J. S. C.

/s/ MAURICE P. O'BRIEN
Attorney

(Certified to be a true and complete copy by Maurice P. O'Brien Esq.)

Appendix G—Decision, Opinion and Order of the Appellate Division, Third Department, Affirming the Order of Supreme Court, Broome County.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

21795

January 3, 1974

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

v.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Order affirmed, with costs.

Opinion *Per Curiam.*

Herlihy, P. J., Cooke, Sweeney, Kane and Main, JJ., concur.

#21795

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Argued, November 19, 1973.

Before:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

APPEAL from so much of an order of the Supreme Court at Special Term (Robert O. Brink, J.), entered October 19, 1972 in Broome County, which granted plaintiff's motion for a preliminary injunction as against the individually named defendants and the defendant Susquehanna Valley Teachers' Association.

Bernard F. Ashe, for appellants, 80 Wolf Road, Albany, New York 12205.

Shaw, Esworthy, O'Brien & Crowley (Frank C. Shaw of counsel), for respondent, 123 Front Street, Binghamton, New York 13905.

Opinion for Affirmance.

Per Curiam.

This is an appeal from so much of an order of the Supreme Court at Special Term, entered October 19, 1972 in Broome County, which, after hearing testimony and accepting evidence, granted plaintiff's motion for a preliminary injunction as against the individually named defendants and the defendant Susquehanna Valley Teachers' Association.

On October 6, 1972, 130 members of the 160-member faculty of the plaintiff's school district went on strike. The defendant Susquehanna Valley Teachers' Association is the bargaining representative under the Taylor Law for all of the teachers in the plaintiff's school district. The strike lasted until November 1, 1972. On October 11, 1972 the Supreme Court at Special Term, upon application of the plaintiff, granted an order to show cause why a preliminary injunction should not be issued, said proceeding being returnable on October 18, 1972. The order to show cause provided that service of the order "and the papers on which it was based (the summons and complaint)" be made on or before October 12, 1972 by delivery "to any of the above officers of Defendant Teachers' Associations and on any person acting for or in behalf of the New York Congress of Teachers in this matter. Service of certified copy of this order on persons unnamed herein shall be sufficient."

Certified copies of the order and other papers in the proceedings were served on the individuals named (the above named individual defendants), two of whom were the president and the treasurer of the Susquehanna Valley

Teachers' Association. Certified copies of the order were also served on individual strikers.

On October 13, 1972 the defendants moved to dismiss the proceeding and to vacate the October 11 *ex parte* order, said motion being made returnable on the same date as plaintiff's motion, October 18, 1972. Upon the return date, Special Term denied the defendants' motion for dismissal and at the close of testimony on behalf of the plaintiff in support of a preliminary injunction it granted such injunction as against the Susquehanna Valley Teachers' Association and all of its officers and members individually, denying, however, such an injunction as to the New York State Congress of Teachers as the plaintiff had failed to prove justification as against that organization.

Upon this appeal, the defendants raise several issues, to wit:

1—The court did not acquire jurisdiction over the New York Congress of Teachers, the Susquehanna Valley Teachers' Association, the named individual defendants or the unnamed defendants;

2—the complaint was defective and failed to state a cause of action;

3—the temporary restraining order of October 11, 1972 should not have been issued;

4—the preliminary injunction should not have been granted;

5—the order granting a preliminary injunction is constitutionally void insofar as it infringes upon, interferes with and denied defendants' First Amendment rights protected by the United States Constitution.

The sole issue which might have any merit in this court is the contention of the defendants that the court did not acquire jurisdiction over them. Section 13 of the General

Associations Law, as applicable to jurisdiction over unincorporated associations, provides in part as follows:

> The service of summons, subpoena or other legal process of any court upon the president, vice president, treasurer, assistant treasurer, secretary, assistant secretary, or business agent, *in his capacity as such* shall constitute service upon a labor organization. Such service shall be made on such individuals in the manner provided by law for the service of a summons on a natural person (emphasis supplied).

There is no doubt that the appropriate officers of the Susquehanna Valley Teachers' Association were personally served with the necessary papers in this proceeding. However, the defendant associations contend that, in asmuch as such officers were named in the proceeding as individual defendants, they were not served as officers of the association. Nevertheless, paragraph three of the complaint indicates the representative capacity of several of the individual defendants and there is no doubt that they were served in their representative capacity as well as their individual capacity and that the papers would give notice to them of such service (see *Matter of Motor Haulage Co. [Teamsters' Union]*, 298 N. Y. 208). Furthermore, the defendants moved for relief in the proceeding without any issue as to proper service and, accordingly, the court acquired jurisdiction in personam.

Upon the present record the defendants have failed to establish a lack of jurisdiction as to the Susquehanna Valley Teachers' Association. Defendants' contentions that the temporary restraining order should not have been issued without notice and that the preliminary injunction is unconstitutional are without any substantial merit (see *City of New York v. De Lury*, 23 N. Y. 2d 175, app. dsmd.

394 U. S. 455, reh. den. 396 U. S. 872; *Rankin v. Shanker*, 23 N. Y. 2d 111; *Matter of State of New York v. Fuller*, 31 A. D. 2d 71).

The record establishes that the plaintiff made a preliminary showing of immediate and irreparable injury which would result if the strike continued and there was no abuse of discretion on the part of Special Term in granting the preliminary injunction.

The order should be affirmed, with costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of November, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Broome County Clerk's Index No. 102266.

The Appellants having appealed from so much of an order of the Supreme Court of Broome County, entered on the 19th day of October, 1972, in the office of the clerk of the County of Broome which granted plaintiff's motion for a preliminary injunction as against the individually

named defendants and the defendant, Susquehanna Valley Teachers' Association, and said appeal having been presented during the above-stated term of this Court, and having been argued by Bernard F. Ashe, Esq., of counsel for appellant, and by Frank C. Shaw, Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a *Per Curiam* opinion on the 3rd day of January, 1974, it is hereby

ORDERED that the order below is hereby affirmed, with costs.

ENTER:

JOHN J. O'BRIEN
Clerk

Dated and Entered: January 22, 1974

A True Copy
JOHN J. O'BRIEN
Clerk

Appendix H—Constitutional and Statutory Provisions.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Civil Service Law Art. 14

§210. Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

• • •

Civil Practice Law and Rules Art. 63

§6313. Temporary restraining order

(a) Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law, nor against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties. This section shall not apply to the attorney general when an application is made by the attorney-general in a proceeding under article twenty-three-a of the general business law.

Appendix I—The *ex parte* Order to Show Cause with Temporary Restraining Order Signed by Justice Brink, Supreme Court, Broome County.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

Upon reading and filing the annexed Summons and Complaint in this action duly verified by the Plaintiff on the 10th day of October, 1972 together with the Affidavits and Exhibits affixed thereto, and the Affidavit of Francis P. Donnelly seeking an Order to Show Cause, let the Defendants show cause before this Court at an adjourned Special Term thereof to be held in and for the County of Broome in the County Courthouse on the 18th day of October, 1972 in the City of Binghamton, New York at 10:00 o'clock in the forenoon, or as soon thereafter as Counsel can be heard at the Chambers of the Undersigned Justice why a preliminary injunction should not be granted herein injoining [*sic*] the individual Defendants,

the Defendant Associations, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teacher in Plaintiff School District Schools; from marching on the School grounds or said School District on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, all on the grounds that Defendants are or are procuring or suffering to be done acts in violation of the Plaintiff's rights respecting the subject of this action; that Defendants' actions are contrary to the provisions of Section 210 of the Civil Service Law of the State of New York and that Plaintiff is entitled to an injunction under Section 211 of said Law and it further appearing that immediate and irreparable injury, loss or damage will result unless the Defendants are restrained before a hearing can be had and it is further

ORDERED that pending the hearing and determination of this motion, the individual Defendants herein, the Defendant Association, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teacher in Plaintiff School District's Schools; from picketing and by marching on the school grounds of said School District during normal class hours, 7:45 A.M. to 3:35 P.M. on Monday through

Friday; from intimidating coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; . m contacting in person or by phone those persons e. lo.ed by the District or who voluntarily or otherwise . . Pl intiff in carrying out its lawful duties of ma.....ning school, pending the argument of this motion; and it is further

ORDERED that service of this Order and the papers upon which it is based (and the Summons and Complaint) be made on or before the 12th day of October, 1972 by delivering copies of said papers and a certified copy of this Order to any of the above officers of said Defendant Teachers' Associations and on any person acting for or in behalf of the New York Congress of Teachers in this matter. Service of certified copy of this Order on persons unnamed herein shall be sufficient.

ENTER:

Signed at Chambers
this 11th day of October, 1972.

/s/ ROBERT O. BRINK
J. S. C.

(Certified to be a true and complete copy by Frank C. Shaw Esq.)

Appendix J—Order to Show Cause to Vacate *ex parte* Order and Temporary Restraining Order and Affidavit of Bernard F. Ashe, Esq., in Support Thereof.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

On reading and filing the annexed affidavit of Bernard F. Ashe, sworn to the 13th day of October, 1972, the annexed affidavit of Lynn H. Blanton, sworn to the 13th day of October, 1972, and the Order of Mr. Justice Robert O. Brink, dated October 11, 1972, and all of the papers upon which said order was granted,

Let the plaintiff show cause before this court at an Adjourned Special Term thereof to be held at the Broome County Court House in the City of Binghamton, New York, on the 18th day of October, 1972, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard at the Chambers of the undersigned Justice why an order should not be made, pursuant to Section 6314

of the Civil Practice Law and Rules, vacating the said Order to Show Cause and Temporary Restraining Order as being null and void *ab initio* upon the grounds that plaintiff has failed to properly commence the action by filing a proper complaint; that plaintiff has not shown any threat or occurrence of immediate irreparable injury, loss or damage justifying the issurance [*sic*] of such order; that said order is overly broad and in violation of the constitutional rights of the defendants as guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by the Constitution of the State of New York; and that the complaint does not state a cause of action and for such other and further relief as to the court may seem just and proper.

Sufficient reason appearing therefor, let service of a copy of this order and a copy of the papers on which it is granted upon Shaw, Esworthy, O'Brien & Crowley, attorneys for plaintiff, by leaving said copy at their office, or by personal service upon plaintiff School District by service upon any member of the Board of Education of plaintiff School District or the official Clerk of said School District, on or before 5 p.m. o'clock the 16th day of October, 1972, be deemed good and sufficient service upon plaintiff.

Dated: October 13, 1972
Binghamton, New York

ENTER

/s/ ROBERT O. BRINK
Justice of the Supreme Court

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

State of New York,
County of Broome, ss:

BERNARD F. ASHE, being duly sworn deposes and says that:

1. Deponent is an attorney duly licensed to practice law in the State of New York and is one of the co-counsel for the defendant Susquehanna Valley Teachers Association and the individual defendants herein.

2. Deponent is familiar with the Order to Show Cause and Temporary Restraining Order signed by Mr. Justice Robert O. Brink dated October 11, 1972, and the papers upon which the same was based, a copy of which is attached hereto and made a part hereof. This affidavit is made in support of the aforesaid defendants' motion to vacate the said Order to Show Cause and Temporary

Restraining Order dated October 11, 1972, as being null and void *ab initio* on the basis of objections in point of law.

3. Article 63 of the Civil Practice Law and Rules (Section 6301) limits the granting of temporary restraining orders to situations "pending a hearing for a preliminary injunction where it appears immediate irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

4. Article 63 of the Civil Practice Law and Rules (Section 6313) further requires that "upon granting a temporary restraining order the court shall set the hearing for the preliminary injunction at the earliest possible time."

5. That the complaint and affirmation of Ernest R. Wheelock failed to set forth facts sufficient to show a threat of immediate or irreparable loss to the plaintiff or to state a proper cause of action.

6. That the relief sought by the complaint has already been granted and therefore the requirements of Article 63 of the Civil Practice Law and Rules have not been complied with in the issuance of the Temporary Restraining Order.

7. That the kind of injunctive relief envisioned by Section 211 of the Civil Service Law is a permanent injunction; and that no such relief has been requested in the complaint.

8. That the naked allegation of the violation of Section 210 of the Civil Service Law is not sufficient in and of itself to warrant the issuance of a temporary restraining order.

9. The plaintiff's unclean hands prevent the issuance of a temporary injunction.

10. That the aforesaid order of Mr. Justice Brink purports to limit the rights of defendants to speak freely; to peacefully assembly and to petition for the redress of grievances. These rights are protected against governmental interferences by the 1st and 14th Amendments to the Constitution and by the Constitution of the State of New York.

11. That for all of the foregoing reasons the Temporary Restraining Order is void *ab initio* and the complaint fatally defective as a matter of law.

12. That this matter is brought on by Order to Show and not by Notice of Motion because there is not sufficient time to serve the usual Notice of Motion.

13. No previous application has been made for the relief sought herein or for similar relief.

/s/ BERNARD F. ASHE

(Sworn to by Bernard F. Ashe Esq. on October 13, 1972.)